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No. 85-1672.

In the Supreme Court of the United States.

OCTOBER TERM, 1986.

UNITED STATES OF AMERICA,
PETITIONER,

v.

WILLIAM D. MERCHANT,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

Brief for the American Civil Liberties Union and the National Association of Criminal Defense Lawyers as Amici Curiae Supporting Respondent.

NANCY GERTNER,
JUDITH H. MIZNER,
SILVERGLATE, GERTNER, BAKER, FINE, GOOD & MIZNER,
88 Broad Street,
Boston, Massachusetts 02110.
(617) 542-6663
For Amici Curiae American Civil Liberties Union and National Association of Criminal Defense Lawyers

On the Brief:
JONATHAN BACKMAN

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

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STATEMENT OF INTEREST OF THE AMICUS CURIAE

The National Association of Criminal Defense Lawyers, Inc. (NACDL) is a District of Columbia non-profit corporation with a membership of more than 4,000 lawyers, including representatives of every state. NACDL was founded over twenty-five years ago to promote study and research in the field of criminal defense law, to disseminate and advance the knowledge of the law in the field of criminal defense practice and to encourage the integrity, independence, and expertise of defense lawyers.

Among NACDL's stated objectives is the promotion of the proper and constitutional administration of criminal justice. Consequently, NACDL concerns itself with the protection of individual

rights and the improvement of the criminal law, its practices and procedures. A cornerstone of this organization's objective, and of the criminal justice system, is the fundamental constitutional protection of an individual's Fourth Amendment rights. NACDL is very concerned about any decision that would further undermine this constitutional guarantee, as would adoption of the position taken by the petitioner in the instant case.

The Amicus Curiae Committee of the NACDL has discussed this case and decided that the issues are of such importance to defense lawyers throughout the nation that NACDL should offer its assistance to the Court.

The American Civil Liberties Union (ACLU) is a nationwide, nonpartisan organization of over 250,000 members

dedicated to protecting and preserving the liberties safeguarded by the Constitution and the Bill of Rights. The prohibition against unreasonable searches and seizures contained in the Fourth Amendment is critically important among those safeguards. The ACLU has participated in many of the leading cases in which this Court has given shape and content to the Fourth Amendment's guarantee. In Mapp v. Ohio, 367 U.S. 643 (1961), the ACLU filed the only brief before the Court urging application of the exclusionary rule to the states, and was permitted by the Court to raise the point at oral argument. 367 U.S. at 646 n.3. The ACLU appeared as amicus curiae in Illinois v. Gates, 462 U.S. 213 (1983) and United States v. Leon, 468 U.S. 497 (1984), and represented the defendant in Massachusetts v. Sheppard, 468 U.S. 981

(1984). The ACLU appears here again because of its belief that it is crucial to limit the application of the good faith exception only to searches pursuant to a warrant.

SUMMARY OF ARGUMENT

The government urges this Court to extend the "good faith" exception to the Fourth Amendment's exclusionary rule of United States v. Leon, 468 U.S. 897 (1984), to a warrantless search allegedly conducted as a probation search.[1] While amici and others have raised concerns about the impact of the good faith exception to the exclusionary rule many

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[1] While we support the due process claims of the respondent, that a defendant may not be subject to a warrantless search conducted pursuant to a probation condition that was imposed in his absence, without his knowledge and without his consent, amici will address

times during the past several terms of this Court, there can be no doubt that these concerns apply with special significance to extending the exception to warrantless searches. Indeed, we believe that this is perhaps the least appropriate case in which to consider extending the good faith exception; the application of a good faith exception in this case would be contrary to the rationale of Leon and would substantially dilute the protections of the Fourth Amendment.

The first question to be addressed is whether, as the Ninth Circuit found, law enforcement officials used a probation search as a pretext for conducting a warrantless search. The second question is whether, assuming the officers intended to conduct a warrantless probation

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only the Fourth Amendment issues.

search, but failed to comply with its requirements, their conduct should somehow be excused as having been in "good faith" within the meaning of Leon.

As to the first issue, whether this was a law enforcement search, this case raises no new legal issues. The Ninth Circuit's decision fits within well-established decisional law which already takes into account the Court's concerns with reasonable police behavior and the exigencies of criminal and administrative investigations. Numerous cases have recognized that government officials, like probation officers, arson investigators, or building inspectors, may have a right to conduct warrantless searches of a citizen's home or business for some purposes and under specified conditions, but are held to the full rigors of the Fourth Amendment when they search with

law enforcement motives.

Nor does this case raise any unique factual problems. This Court has never had any difficulty in sorting out proper administrative searches from improper or pretextual law enforcement searches, and this case presents none. It was a search conducted exclusively by law enforcement officers, for law enforcement purposes, without consultation with, or participation by, probation officers.

With respect to the second issue, even if this Court agrees that the officers attempted a probation search, but erred with respect to whether or not the defendant had proper notice of the conditions of his probation, it should not extend Leon. Leon legitimized the conduct of an officer who had consulted with a neutral magistrate, presented the facts of his investigation which he

believed provided probable cause for a particularly described search, and received the magistrate's imprimatur. The extension the government urges would excuse the conduct of an officer who opted to invade a citizen's privacy without any prior judicial screening of the basis for, or the scope of, a particular search. Excusing good faith mistakes about probable cause, where the law enforcement officer has obtained a warrant, has a far less dramatic impact on personal privacy than excusing mistakes about whether to obtain a warrant in the first instance.

The government's claim that seeking judicial clarification of the defendant's probationary status was the equivalent of the actions of the Leon officers in securing a warrant is totally disingenuous. This "judicial clarification"

process was far from the equivalent of a warrant review. It did not deal with the proposed search at all. The officers sought only a determination that respondent was, in fact, on probation. While they had decided to search if the court held that he was on probation, they never bothered to disclose that fact to the judge. Nor did they apprise the judge of their suspicions that respondent was violating the terms of his probation. Rather, they found an exception to the warrant requirement, sought judicial approval that the exception applied (without disclosing their motives), and used it as a pretext to conduct a warrantless search. If the Court labels government efforts to obtain this kind of perfunctory approval "good faith", and equivalent to the good faith of the officers in Leon who sought a warrant for

the particular search they wished to conduct, it will be trivializing the warrant process.

The dangers to the ability of courts to deter Fourth Amendment violations if Leon is extended to warrantless searches cannot be overstated. A new excuse for constitutional violations, perhaps more egregious than the violation in Leon, would be created--that an officer made a reasonable mistake about whether his conduct fit within an exception to the warrant requirement. The likely result is that the numbers of warrantless searches would increase and the central protection of the Fourth Amendment would be undermined.

Amici are particularly troubled about the impact on the development of the decisional law if Leon is extended to warrantless searches. While it had been

argued that Leon would have an adverse effect on decisional law regarding probable cause, there is no doubt that the impact on the law of warrantless searches would be even more substantial. It is critically important that judges delineate with precision the bright-line categories defining when a warrant is constitutionally required. Since the finding of "good faith" mistake in failing to obtain a warrant could obviate the need to determine whether the officer's conduct was constitutionally permissible, there will necessarily be less incentive for courts to precisely define the narrow and limited exceptions to the warrant requirement.

Moreover, there is no need for a good faith exception to the warrant requirement to address the Court's concerns. The existing exceptions to the

warrant requirement already permit courts to take into account the reasonable needs of law enforcement, the exigencies of a criminal investigation, and even the perceptions of officers in the field.

In sum, we believe the harm to the privacy rights of citizens that would result from expanding the "good faith" exception to warrantless searches would be incalculable and the government's effort to do so here should be rejected.

ARGUMENT

I. THE SEARCH OF THE RESPONDENT'S HOME WAS A LAW ENFORCEMENT SEARCH USING A PROBATION SEARCH AS A PRETEXT; IT WAS CONDUCTED WITHOUT PROBABLE CAUSE, WITHOUT A WARRANT, AND OUTSIDE THE SCOPE OF ANY EXCEPTION TO THE WARRANT REQUIREMENT

The government has argued that the warrantless search of respondent's home was a probation search undertaken in good faith. The Ninth Circuit disagreed, concluding that the officers used

respondent's probation status as a pretext for an unconstitutional law enforcement search. United States v. Merchant, 760 F.2d 963, 969 (9th Cir. 1985). In effect, whether or not respondent was in fact on probation at the time of the warrantless search is irrelevant. Whatever limited rights a probationer may have vis a vis probation officers, he has the full panoply of Fourth Amendment rights vis a vis law enforcement officers and any other officials who are acting outside the needs of the probation system. United States v. Johnson, 722 F.2d 525, 527 (9th Cir. 1983); United States v. Gordon, 540 F.2d 452, 453-54 (9th Cir. 1976). See generally 3 LaFave, Search and Seizure, Sec. 10.10, at 435-443 (1979).

A. The Ninth Circuit decision fits within the existing framework of decisional law concerning administrative searches, a framework which appropriately balances the needs of law enforcement and administrative agencies against the constitutional rights of individuals

Although this Court has never addressed warrantless searches of probationers, its decisions in cases involving regulatory searches provide a framework to analyze this case, one which already takes into account the circumstances of the search, including the officer's motives and the legitimate needs of law enforcement.[2]

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[2] Respondent argues that, as a matter of state law, the search conducted by law enforcement officers here, wholly without the participation or knowledge of the probation authorities, was not a probation search. However, whether or not California law specifically prohibits law enforcement officers from conducting warrantless searches under the instant circumstances, federal constitutional law, as Section I demonstrates, clearly

1. Law Enforcement Motive

Warrantless searches undertaken by officials for the purpose, not of supervising probation,[3] but rather of investigating criminal behavior, violate the probationer's right to be free from unreasonable searches and seizures. United States v. Johnson, supra; United States v. Hallman, 365 F.2d 289 (3rd Cir.

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does. The state could no more authorize every law enforcement officer to conduct warrantless searches of any and all probationers than it could authorize every law enforcement officer to conduct warrantless searches of business premises. Any such authorization would necessarily be bound by the limits of the Fourth Amendment.

[3] Although a number of the cases cited herein address the rights of parolees, they are used interchangeably with probation cases since "there is no difference between the constitutional status of probationers and parolees." Owens v. Kelley, 681 F.2d 1362, 1367 n. 8 (11th Cir. 1982), reh. den., 697 F.2d 1094 (1983), citing Gagnon v. Scarpelli, 411 U.S. 778 (1973).

1966). Although the probation officer's dual function of rehabilitating the probationer and protecting society may, under strict limitations, empower him to conduct searches outside the usual Fourth Amendment strictures,[4] this special power is necessarily limited by the extent to which probation imposes special restraints on the permissible activity of

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[4] A substantial minority of courts have held that although there may be a reduced burden for the issuance of a warrant, "a probation officer is required to obtain a warrant prior to conducting a search of a probationer's home unless the search falls within a judicially recognized exception to the warrant requirement." United States v. Rea, 678 F.2d 382, 388 (2d Cir. 1982); United States v. Workman, 585 F.2d 1205, 1207-1208 (4th Cir. 1978); People v. Jackson, 412 N.Y.S.2d 884, 887, 46 N.Y.2d 171 (1978).

the probationer.[5] While probationers

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[5] Two theories have been used to justify unlimited warrantless searches of probationers and parolees. The first, the "constructive custody" theory of probation and parole, held that such massive invasions of privacy were possible because probationers were entitled to no more constitutional protection than prisoners. White, The Fourth Amendment Rights of Parolees and Probationers, 31 U. Pitt. L. R. 167, 175-81 (1969). See also People v. Mason, 5 Cal.3d 758, 97 Cal. Rptr. 302, (1971). However, reliance on this theory to deny constitutional protections was vigorously attacked by the commentators, see, e.g., 3 LaFave, supra, at 423-425; White, supra at 180; Note, 22 Stanford L. Rev. 129, 133 (1969), and has been generally rejected by the courts. See Morrissey v. Brewer, 408 U.S. 471, 482 (1972); Gagnon v. Scarpelli, 411 U.S. 778 (1973) (extending Morrissey to probationers); People v. Burgener, 41 Cal. 3d 505, 224 Cal.Rptr. 112, 126-28 (1986). See also United States v. Bradley, 571 F.2d 787, 789 (4th Cir. 1978); United States v. Consuelo-Gonzales, 521 F.2d 259, 263 (9th Cir. 1975). The other theory used to justify searches of probationers and parolees is the assertion that these citizens waive their Fourth Amendment rights by accepting the conditions of their release. See 3 LeFave, supra, at 426-431. While this theory must be understood in the light of subsequent

may lose some of their Fourth Amendment protection with respect to searches pursuant to the conditions of their release, they are entitled to all constitutional safeguards vis-a-vis government officials acting with law enforcement motives. Latta v. Fitzharris, 521 F.2d 246, 250-51 (9th Cir. 1975); People v. Way, 319 N.Y.S.2d 16, 65 Misc. 22665 (Sp.Term.

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cases, e.g., Schneckloth v. Bustamonte, 412 U.S. 218 (1973) (waiver of constitutional right must be knowing and voluntary); United States ex. rel. Coleman v. Smith, 395 F.Supp. 1155 (W.D.N.Y. 1975), the issue is irrelevant. Whatever this Court's determination as to respondent's probationary status on the date of the search, there is no question, as the government concedes, that respondent did not know that he was on probation at the time. Thus, he could not possibly have consented to the specific term of his probation that he submit to warrantless searches at any time. Cf. Freytas v. Superior Court, 60 Cal.App.3d 958, 132 Cal.Rptr. 26 (1976).

1971).[6] Warrantless searches which are not undertaken for probation purposes simply cannot pass constitutional muster. United States v. Scott, 678 F.2d 32, 34 (5th Cir. 1982), reh. den., 683 F.2d 1373; United States v. Consuelo-Gonzalez supra; State v. Griffin, 131 Wis. 41, 388 N.W.2d 535, 540-46 (1986).[7]

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[6] As the Court noted in New Jersey v. T.L.O., ___U.S.___, 105 S.Ct. 733, 745 (1985):

> [T]he mere fact that law enforcement may be made more efficient can never by itself justify disregard of the Fourth Amendment. The investigation of crime would always be simplified if warrants were unnecessary. But the Fourth Amendment reflects the view of those who wrote the Bill of Rights that the privacy of a person's home and property may not be totally sacrificed in the name of maximum simplicitly in enforcement of the criminal law.

[7] Although some courts in the past had concluded that a probationer had a lesser constitutional interest in his privacy than the ordinary citizen, see e.g.,

This Court has so held in a number of other administrative settings. In Michigan v. Clifford, 464 U.S. 287 (1984), the Court addressed the admissibility of evidence discovered in a warrantless search of a burned building

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People v. Mason, supra, this approach confuses the right of the probationer to be free from unreasonable government invasions of his privacy with the reasonableness of the government's actions in intruding on privacy under certain circumstances. The question is not whether a probationer's Fourth Amendment rights are diminished in some abstract way because of his status as "a probationer," but whether, despite probationer's constitutional interest in privacy, the government's needs with respect to supervising him during probation justify certain intrusions into his privacy that would not be permissible in the case of an ordinary citizen. See United States v. Scott, supra, 678 F.2d at 34-35; Owens v. Kelley, supra, 681 F.2d at 1366-9; 3 LaFave, supra, at 431. Cf. Donovan v. Dewey, 452 U.S. 594 (1981) (warrantless investigatory search of mines constitutional because of needs of regulatory system for quick and frequent inspections); Camara v. Municipal Court, 387 U.S. 523 (1967).

after the cause of the fire had already been determined. In suppressing the evidence, the Court found that the officials' objective in undertaking a warrantless search was critical to its validity.

> "The object of the search is important even if exigent circumstances exist. Circumstances that justify a warrantless search for the cause of a fire may not justify a search to gather evidence of criminal activity once that cause has been determined. If, for example, the administrative search is justified by the immediate need to ensure against rekindling, the scope of the search may be no broader than reasonably necessary to achieve its end. A search to gather evidence of criminal activity not in plain view must be made pursuant to a criminal warrant upon a showing of probable cause."

Id. at 294-295.[8]

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[8] See also, Michigan v. Tyler, 436 U.S. 499, 511 (1978) ("[W]e hold that an entry to fight a fire requires no warrant, and that once in the building, officials may remain there for a reasonable time to investigate the cause of the blaze. There-

Implicit in the cases upholding warrantless searches as part of an administrative scheme is the necessity for careful judicial scrutiny of the motives of the searching officials. Because warrantless administrative searches can only satisfy constitutional mandates if they are "essential" to the enforcement of the regulatory scheme, United States v. Biswell, 406 U.S. 311, 316 (1972), Hudson v. Palmer, __U.S.__, 104 S.Ct. 3194, 3201 (1984), and "specifically tailored to address [its] concerns," Donovan v. Dewey, supra, 452 U.S. at 603, the court must determine whether the searches were conducted solely for the administrative purposes for which they

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after, additional entries to investigate the cause of the fire must be made pursuant to the warrant procedures governing administrative searches.") (Emphasis added).

were sanctioned. Otherwise, the "authority to make warrantless searches devolves almost unbridled discretion upon executive and administrative officers" Marshall v. Barlow's, Inc., 436 U.S. 307, 323 (1978).[9] See United States v. Jarrad, 754 F.2d 1451, 1455 (9th Cir. 1985); cert. den., ___U.S.___, 106 S.Ct. 96; Owens v. Kelley, supra, 681 F.2d at 1369; United States v. Consuelo-Gonzales, supra, 521 F.2d at 267.

That the concerns of the administrative officer with broader search powers may occasionally overlap those of the police officer is not determinative. In-

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[9] See also, United States v. Lawson, 502 F.Supp. 158, 165 (D.Md. 1980) ("Once the purpose shifts from administrative compliance to a quest for evidence to be used in a criminal prosecution, the government may constitutionally enter the premises only upon securing a warrant supported by full probable cause.").

deed, in most of the administrative search cases the law enforcement officer and the administrative official shared the same concerns.[10] This suggests that the Court must carefully analyze the objective circumstances of the search (including those discussed below) and not accept at face value the law enforcement officer's claimed administrative purpose.

Finally, that in some cases it may be difficult to parse out the official's

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[10] In some cases, the administrative official is searching for information of value in the criminal investigation as well. For example, information bearing on the goal of an arson prosecution was also relevant to the arson investigator's goal of finding the cause of the fire in Michigan v. Tyler, supra; information bearing on drug offenses was also relevant to the school officials' goal of disciplining students in New Jersey v. T.L.O, supra. Alternatively police officers may argue, as do petitioners here, that they have a general interest in seeing to it that all rules, including probation rules, are obeyed.

true purposes does not affect the instant case. There is no such problem here; the facts are clear. (See section I(C)).

2. Absence of Probation Officer Approval, Participation, or Supervision

Quite apart from the purpose of the search, warrantless searches of probationers conducted by police without the authorization, supervision or participation of a probation officer, as here, plainly infringe on probationers' constitutional rights. E.g. United States v. Consuelo-Gonzales, supra, 521 F.2d at 266; State v. Fogarty, 187 Mont. 393, 610 P.2d 140 (1980). Neither the special needs of the probation system, nor the special relationship between the probation officer and the probationer -- the two factors which together have been held to validate warrantless probation searches in certain contexts, United

States v. Thomas, 729 F.2d 120, 123 (2d Cir. 1984), cert.den., ___U.S.___, 105 S.Ct. 158 -- can possibly justify the invasion of constitutional rights which flows from permitting any law enforcement official, acting wholly outside the probation system, to conduct a warrantless search merely because of a person's status as a probationer.

Thus, whether, as a matter of state law,[11] police officials may assist a probation officer in conducting a warrantless search, or may undertake a search with the probation officer's authorization but in his absence, is not determinative. If such a search is to withstand a constitutional challenge, the supervising probation officers must participate in a fashion sufficient to

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11 See fn. 2.

justify the special incursions on the probationer's Fourth Amendment rights. United States v. Scott, supra; United States v. Consuelo-Gonzales, supra, 521 F.2d at 266 (invalidating search of probationer by law enforcement agents because although "[p]robation authorities...have a special and unique interest in invading the privacy of probationers, [t]his special and unique interest does not extend to law enforcement officers generally").[12] United States v. Whiting, 781 F.2d 692, 696 (9th Cir. 1986) ("A warrantless border search is valid only if conducted by officials specifically authorized to conduct such

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12 See also Wood v. State, 378 So.2d 110 (Fla. App. 1980); State v. Bollinger, 169 N.J.Super. 553, 405 A.2d 432 (1979); State v. Age, 38 Or.App. 501, 590 P.2d 759 (1979); Grubbs v. State, 373 So.2d 905, 909 (Fla. App. 1979).

searches.").

While a probationer may feel intruded upon when a probation officer whom he knows and presumably trusts comes to the door and asks to have a look inside the house, that cannot compare to the feelings of fear and helplessness which result when a number of armed and unknown law enforcement officials present themselves and demand entrance. Lacking the warrant which tells the citizen that there is a judicial officer who is aware of what is happening and who has authorized, and limited the scope of the invasion, such intrusions are bound to instill terror in the individual, his family and his friends present at the search. Extending that authority to an unlimited multitude of government officials would violate sacred principles at the core of the Fourth Amendment's

historic function.

B. The Ninth Circuit's conclusions that the instant search was a law enforcement search, using the probation rationale only as a pretext, should be sustained

By every measure, the search conducted by the officers in this case was a law enforcement search masquerading as a probation search, as the Ninth Circuit found. There was no special probation purpose for this search. Moreover, none of the justifications for probation searches applied. It was not a search legitimized by the "special needs" of the probation system or the "special relationship" of the probation officer to the probationer.

Respondent was never assigned a probation officer. The state made no efforts to rehabilitate, counsel or supervise his activities. The assistant district attorney, after receiving

reports of gunfire on respondent's property, did not contact the probation department. Rather, without informing the court of respondent's suspected activity, or of her earlier conversations with law enforcement officers about conducting a search of respondent's residence, or of her plans to search if the court announced respondent was on probation, she appeared before the sentencing judge on a motion for clarification or modification of respondent's probation. The search followed on the heels of the court's order. It was conducted entirely by law enforcement officers without consultation with, or the participation of, probation officers.

In a warrantless search the government has the burden of justifying its failure to obtain a warrant. E.g.,

Coolidge v. New Hampshire, 403 U.S. 443, 454-455 (1971). It is apparent that on these facts it cannot. The government's suggestion that this had to be a probation search since the searching officers had no information that a crime under California law had been committed is insufficient.[13] If the police officers knew nothing about respondent, except that there were reports of gunfire on his property, they would have been warranted in investigating further for possible criminal violations. Hearing a gun discharge could raise the suspicion of criminal gun violations or, for that

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13 The officers had heard reports that a gun had been discharged on respondent's property. Since it was not a crime for an individual to have a gun, unless that individual had been convicted of a felony and, as of that moment, respondent had not, the only offense, they maintain, was a probation offense.

matter, suspicions about a host of other offenses, including murder. To say that a law enforcement investigation begins only the moment a fully formed crime is known to have occurred is nothing short of absurd.

Indeed, it was precisely because the officers did not have sufficient evidence of a criminal offense to seek a warrant that they sought to use respondent's probation status. If they had considered this to be a law enforcement investigation, they would have been required to refrain from searching until further investigation produced evidence meeting the probable cause standard and to obtain a warrant. Rather than taking the constitutional path, they looked elsewhere for pretexts. The fact that respondent might have been on probation was fortuitous since it meant that

respondent would be subject to rules far more elaborate than those in the criminal code.

However, the Constitution expressly bars a law enforcement officer from taking advantage of a probationer's status in just this fashion, namely as a pretext to avoid the rigors of the Fourth Amendment.

II. THIS COURT SHOULD NOT EXTEND LEON TO WARRANTLESS SEARCHES

United States v. Leon, supra, and Massachusetts v. Sheppard, supra, announced an exception to the exclusionary rule for evidence obtained during unconstitutional searches in which police reasonably rely on a warrant. The government now asks this Court to extend that "good-faith" exception to warrantless searches. We urge this Court to reject that extension.

First, the rationale of Leon and Sheppard does not apply to warrantless searches: The premise of Leon and Sheppard is that the "deterrence objective" of the exclusionary rule is not furthered where an officer has reasonably relied on a warrant. At the same time, the cost to individual privacy is diminished, the Court found, where a magistrate has reviewed the basis for the search.

The balance is totally different where the officer has avoided the warrant requirement. Wrongfully searching without a warrant can be effectively deterred by sending a strong message that warrantless searches will be tolerated only under limited and carefully scrutinized circumstances. Moreover, the costs to personal privacy are substantial whenever the police intrude upon a person's home

without prior judicial approval.

Second, the law concerning exceptions to the warrant requirement already takes into account this Court's concerns with the needs of law enforcement and the deterrence of unreasonable police conduct. Creating a new excuse for a constitutional violation -- where an officer claims to have made a "reasonable" mistake about whether one of the "reasonable" exceptions to the warrant requirement applied to his conduct -- would dramatically and unnecessarily dilute the Fourth Amendment.

Third, there is perhaps no area of Fourth Amendment jurisprudence in which clear and precise judicial rulemaking is more necessary than in the decisional law defining the exceptions to the warrant requirement. A good faith exception for a warrantless search will discourage

courts from considering whether police conduct fits within an exception to the warrant requirement. The principle focus will shift to whether the officer made a reasonable mistake in concluding that his conduct fell outside the warrant requirement, rather than whether the conduct violated constitutional strictures.

A. Leon and Sheppard Are Inapplicable to Warrantless Searches

The warrant requirement is at the heart of this Court's analyses in Leon and Sheppard. The Court reiterated the Constitution's strong preference for the warrant as a more reliable safeguard to privacy than the hurried judgment of line officers involved in criminal investigations. United States v. Leon, supra, 468 U.S. at___, 104 S.Ct. at 3417. Indeed, the Court described its decision as the "good faith exception for searches

conducted pursuant to warrants." Id. at 3427.

When the Court balanced costs against benefits, it concluded that a good faith exception was justified in warrant searches because applying the exclusionary rule in that limited class of cases would impair society's quest for truth without a concomitant benefit to the effectuation of Fourth Amendment guarantees. There is no deterrence interest, the Court concluded, when police officers are behaving in objectively reasonable reliance on the legal determination of a magistrate.[14] In

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14 As the Court stated:

> This is particularly true, we believe, when an officer acting with objective good faith has obtained a search warrant from a judge or magistrate and acted within its scope. In most such cases, there is no police illegality and thus

effect, where the officer did all that he could reasonably be expected to do by securing a warrant, he cannot be faulted, with certain exceptions,[15] when the

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> nothing to deter. It is the magistrate's responsibility to determine whether the officer's allegations establish probable cause and if so, to issue a warrant comporting in form with the requirements of the Fourth Amendment. In the ordinary case, an officer cannot be expected to question the magistrate's probable cause determination or his judgment that the form of the warrant is technically sufficient. [O]nce the warrant issues there is literally nothing more the policeman can do in seeking do to comply with the law. [citations omitted]"

United States v. Leon, supra, 468 U.S. at __, 104 S.Ct. 3420. See also, Id., 468 U.S. at __, 104 S.Ct. at 3450 (Stevens, J., concurring in part and dissenting in part). Indeed, the Court essentially defined objectively reasonable behavior in terms of the officer's efforts to secure a warrant.

[15] There are a few exceptions: 1) where the warrant was based on an affidavit "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable,"; 2)

warrant is subsequently invalidated. At the same time, because the officer sought the intervention of a magistrate prior to a search, the Court can be reasonably confident that an officer's behavior will not seriously undermine privacy rights. Indeed, the opinions suggest that failure to apply a good faith exception to warrant searches could well have tne undesirable effect of discouraging resort to warrants. United States v. Leon, 468 U.S. at ___, 104 S.Ct. at 3417 ("the preference for warrants is most appropriately effectuated by according 'great deference' to a magistrate's determination"), quoting Spinelli v.

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where the warrant was based on an affidavit the affiant knew to be false; 3) where the issuing magistrate abandoned his judicial role; 4) where in certain circumstances the warrant was clearly facially deficient. United States v. Leon supra, 468 U.S. at ___, 104 S.Ct.

United States, 393 U.S. 410, 419 (1969).

Where the Court concludes that a police officer wrongfully conducted a warrantless search, the same analysis leads to a completely different conclusion. Warrantless searches "are per se unreasonable -- subject only to a few specifically established and well-defined exceptions." Katz v. United States, 389 U.S. 317, 337 (1967). Accord Thompson v. Louisiana, 496 U.S. 17 (1984). The police officer who decides to conduct a warrantless search has not done all that "he can do in seeking to comply with the warrant [requirement]." United States v. Leon, supra, 468 U.S. at __, 104 S.Ct. at 3420. Instead, he has unilaterally chosen to disregard the constitutionally prescribed course for the approval of a

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3421-3422.

search.

Deterrence of similar future errors will be effectuated by excluding the fruits of his error. On the one hand, where the law is clear that a warrant is required, the officer's conduct could not be characterized as "good faith" and there can be no dispute that deterrence requires exclusion. On the other hand, where the law is ambiguous, or unsettled, or the facts unclear, the Constitution compels the officers to "err on the side of constitutional behavior" by obtaining a warrant. United States v. Johnson, 457 U.S. 537, 561 (1982). Exclusion is likewise essential to encourage "erring" on the side of warrants.

Creating a good faith exception for warrantless searches would have precisely the opposite effect of that sought by the Court in Leon. It would provide added

incentives for law enforcement officers to avoid a warrant and take their chances that a court will subsequently label their actions "good faith." An important commentator on the Fourth Amendment explains:

> [P]erhaps of ultimate importance, there is the fact that a broader good faith exception, applicable even when the police conduct did not have the prior approval of the magistrate, would be perceived and treated by police as a license to engage in the same conduct in the future. That is, the risk in such tampering with the exclusionary rule 'is that police may feel that they have been unleashed' and consequently may govern their future conduct by what passed the good faith test in court rather than on the traditional Fourth Amendment standards of probable cause, exigent circumstances and the like.

1 LaFave, Sec. 1.2, at 35 (1986 Supp.), quoting Schlesinger, Exclusionary Injustice: The Problem of Illegally Obtained Evidence (1977).

At the same time, the impact on

personal privacy is qualitatively different in warrantless search cases than it was in Leon. The right to be free from warrantless searches and seizures stands at the heart of the evils which the Fourth Amendment sought to avoid.[16] The Court's "strong preference for warrants," United States v. Leon, supra, 468 U.S. at ___, 104 S.Ct. at 3417, stems from its recognition that, however intrusive a search pursuant to a warrant lacking in probable cause or

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16 See United States v. Payton, 445 U.S. 573 (1980). As Justice Frankfurter explained in Wolf v. Colorado, 338 U.S. 25, 27-28 (1949):

> The security of one's privacy against arbitrary intrusion by the police--which is at the core of the Fourth Amendment--is basic to a free society...The knock at the door, whether by day or by night, as a prelude to a search, without authority of law but solely on the authority of the police did not need the commentary of history to be condemned....

sufficient particularity, that intrusiveness pales in comparison with that engendered by a warrantless invasion into one's home.

B. The Government's Arguments Equating The Efforts of Officials to Seek Judicial Clarification of Respondent's Probation Status with the Efforts of the Agents in Leon to Obtain A Warrant Are Disingenuous

The government claims that the actions of these officials in seeking judicial approval are the equivalent of the actions of the Leon officers in securing a warrant. This argument is totally disingenuous. The government officers here plainly had the time to investigate further and, if they had probable cause, to seek a warrant. But rather than taking the time to do what the Constitution required them to do, they chose only to seek clarification

that respondent was on probation. In effect, they used the judge not for the purpose of reviewing any particular search, but for the purpose of legitimizing their intent to conduct a warrantless search.

Far from being the equivalent of a warrant review, this "judicial clarification" process did not deal with the proposed search at all. Rather than seeking the narrow and precisely defined authority of a search warrant, these officers sought, without constitutional justification, to clothe themselves with the broad based discretion of an administrative officials. The officers did not apprise the judge of their intentions to search the property. They did not spell out where they planned to search and why, as would an officer in a warrant application. Indeed, they presented no facts

even describing their suspicions of probation violations -- although they had all the relevant facts at their disposal. The order that they received was not, like a warrant, limited to time, place and scope. If the perfunctory ceremony these officials went through in the instant case is held to be good faith, or worse, equivalent to the efforts of the officers in Leon to obtain a warrant, we will have trivialized the warrant process and returned to the days of general searches.

C. The Exceptions to the Warrant Requirement Already Incorporate A Reasonableness Test

Limiting the good-faith exception to cases involving warrant searches would not impair the ability of law enforcement officers to effectively perform their duties; the existing exceptions to the warrant requirement have been developed

with a careful eye to the reasonable needs of law enforcement.

This Court has already carved out a number of exceptions to the warrant requirement, holding warrantless searches within those specifically defined categories to be constitutionally permissible under two general theories -- that time constraints or other circumstances make obtaining a warrant too costly for law enforcement, or that the nature of the intrusion justifies a less than probable cause standard. See e.g., Terry v. Ohio, 392 U.S. 1 (1968) (stop and frisk on reasonable suspicion); Carroll v. United States, 267 U.S. 132 (1925 (automobile search); Chimel v. California, 395 U.S. 752 (1969) (search incident to arrest); South Dakota v. Opperman, 428 U.S. 364 (1976) (inventory search); Coolidge v. New Hampshire, 403 U.S. 443 (1971) (plain

view); Schneckloth v. Bustamonte, 412 U.S. 218 (1973) (consent search); and United States v. Ramsey, 431 U.S. 606 (1977) (border search); Camara v. Municipal Court, 387 U.S. 52 (1967) (administrative building search); Marshall v. Barlow's Inc., 436 U.S. 307 (1978) (administrative business search).

Moreover, the Court has exhibited flexibility in applying these exceptions to particular cases. The Court has naturally considered the reasonableness of the searching officer's behavior where, for example, the officer has reasonably searched pursuant to the authority of an ordinance subsequently invalidated. See e.g., Michigan v. DeFillippo, 443 U.S. 31 (1979). And in limited categories of cases the Court has relieved the officer of the burden of demonstrating that the particular

warrantless search at issue was supported by the need for prompt action or the limited nature of the intrusion. See e.g., Illinois v. LaFayette, 462 U.S. 640, 643-647 (1983) (inventory search permissible irrespective of exigent circumstances because "the inventory search is a well-defined exception to the warrant requirement"); Florida v. Meyers ___U.S.___, 104 S.Ct. 1852 (1984) (automobile exception applied to uphold search of impounded vehicle despite vehicle's lack of mobility).

However, with respect to unsettled or ambiguous areas, the Court has refused to delegate the initial authority to determine the nature and scope of exceptions to the warrant requirement to the officer in the field. For example, it has not sanctioned what were described by the government as "reasonable errors" on

the part of police seeking to create a new exception to the warrant requirement, Thompson v. Louisiana, ___U.S.___, 105 S.Ct. 409 (1984) (rejection of "murder scene" exception); Steagald v. United States, 451 U.S. 204 (1981) (rejection of a warrantless search of a person's home pursuant to an arrest warrant for another individual).

The extension of the good-faith exception to every warrantless search would have precisely this effect. It would encourage an officer to rely on his own conclusion that an exception to the warrant requirement was implicated, since the question of whether or not the search was reasonable under the Fourth Amendment would be replaced with the question of whether an officer reasonably believed that to be the case. Unlike the good faith rule in Leon, where the officers'

obligations under the Warrant Clause had already been met, the extension of the exception here would recast the Fourth Amendment's specific proscriptions as a general and vague reasonableness requirement, thereby eviscerating them.

D. The Application of a Good Faith Exception to Warrantless Searches Would Seriously Undermine the Development of Clear Decisional Law Delineating Precise Exceptions to the Warrant Requirement

In Leon, the Court dismissed the concern that the good faith exception would stifle the development of the Fourth Amendment law in warrant cases because it concluded that judges would continue to examine the constitutionality of the magistrate's issuance of a warrant before turning to the question of the reasonableness of the police officer's reliance on it. However, the concern for the lack of development of decisional law

applies with special significance to the application of the good faith exception to warrantless searches.

First, there is no area of Fourth Amendment law where clearly articulated judicial rules are more necessary than in the area of exceptions to the warrant requirement. See United States v. Belton, 433 U.S. 454 (1981). Only by sending clear signals to the police about the limited scope of the exceptions to the warrant requirement can the Court ensure that these officials will abide by the constitutional mandates. Thus, this Court has frequently opted to define warrantless searches by categories rather than by engaging in post-hoc case by case analysis. For example, the Court has created a generic "inventory search" category, Illinois v. Lafayette, supra, or a generic "car search" category,

Coolidge v. New Hampshire, supra, rather than requiring the police to independently demonstrate exigent circumstances in each case. Moreover, while, at the very minimum, Leon told officers to get a warrant, extending the good faith exception to warrantless searches would muddy the very rules concerning when a warrant was required.

Second, if a good faith exception is applied to warrantless searches, there will be an increased risk that reviewing courts will gloss over the constitional violation. In a search warrant case, the reviewing court can function vis a vis the magistrate's order to search, much like an appellate court vis a vis a lower court's decision. As in appellate review, there is a judicial judgment, i.e., a search warrant, and a fixed pre-search record, i.e., the affidavit in support of

the warrant. Like an appellate court deciding whether there is a constitutional violation, followed by a determination of whether there is harmless error, a district court can determine whether the magistrate erred in issuing the search warrant, and only then turn to the reasonableness of the police conduct.

In a warrantless search case, in contrast, the court will have no prior judicial order, and no fixed pre-search record. The only issue the court will be reviewing will be the police officer's conduct. Morever, if Leon were extended to warrantless searches, there is every reason to believe that the post-search record will be cast largely in terms of the police officer's good faith. Finally, since the good faith issue will arise largely at the boundaries of the law, where the law is unsettled, unclear, or

never before addressed, the reviewing court will have every incentive to decide only whether the police reasonably believed that a warrantless search was permissible under the circumstances, without expressly reaching the question of whether or not there was a constitutional violation. Indeed, one of the first "good faith" cases, United States v. Williams, 622 F.2d 830 (5th Cir. 1980) cert.den., 449 U.S. 1127 (1981), which involved a warrantless search, illustrates these dangers. The court disposed of the case without deciding the precise violation committed by the officer.

The result of this will be a stagnation in the development of the Fourth Amendment in the context of warrantless searches. Today's bright line rules and categorical exceptions will shade into a

murky blend of cases in which warrantless searches are excused post-hoc as "reasonable". Judicial oversight of police behavior in an area as central to personal privacy as this will necessarily suffer. See generally, Ingber, "Defending the Citadel: The Dangerous Attack of 'Reasonable Good Faith'", 31 Vanderbilt L.R. 1, 48 (1982); Mertens & Wasserstrom, "The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law", 70 Georgetown L. J. 365, 431 (1981).

CONCLUSION

For all the foregoing reasons, the decision below should be affirmed.

Respectfully submitted,

NANCY GERTNER
JUDITH H. MIZNER
SILVERGLATE, GERTNER,
BAKER, FINE, GOOD & MIZNER
88 Broad Street
Boston, MA 02110
(617) 542-6663
For Amici Curiae
American Civil Liberties
Union and
National Association of
Criminal Defense Lawyers

On the Brief: Jonathan Backman